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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 41

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL., PETITIONERS

v.

FAIRLAWN MEATS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, ET AL., PETITIONERS

v.

GARMON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 280

P. S. GUSS, D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, APPELLANT

v.

UTAH LABOR RELATIONS BOARD

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

OPINIONS BELOW

Case No. 41: The opinion of the Supreme Court of Ohio (R. 172)[1] is reported at 164 Ohio St. 285, 130

[1] The "R" references are to the records in the respective cases.

N. E. 2d 237. The opinions of the Court of Appeals (R. 158–166) and of the Court of Common Pleas (R. 148–156) are unreported.

Case No. 50: The opinion of the Supreme Court of California (R. 43–64) is reported at 45 Cal. 2d 657, 291 P. 2d 1. The opinion of the Fourth District Court of Appeals (R. 30–42) is not officially reported but may be found in 127 A. C. A. 320.

Case No. 280: The opinion of the Supreme Court of Utah (R. 24–33) is reported at 5 Utah 2d 68, 296 P. 2d 733.

JURISDICTION

The petitions for writ of certiorari in Nos. 41 and 50 were granted on May 7, 1956 (No. 41, R. 189; No. 50, R. 64–65). On October 8, 1956, this Court noted probable jurisdiction in No. 280 (R. 36). The jurisdiction of this Court derives from 28 U. S. C. 1257.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 47–53.

QUESTION PRESENTED

The interest of the National Labor Relations Board as *amicus curiae*[1] is limited to the single question common to the three cases, namely, whether Congress by vesting in the National Labor Relations Board jurisdiction over certain labor relations matters affecting interstate commerce has completely displaced state power to deal with such matters in situations where

[1] The Court invited the Solicitor General to file briefs in these cases setting forth the views of the Board.

the Board properly declines or obviously would decline to exercise its jurisdiction.

STATEMENT

Case No. 41

Fairlawn Meats, Inc., herein called Fairlawn, is an Ohio corporation and operates three meat markets in the vicinity of Akron, Ohio (R. 158; 45–46). All of its sales are intra-state (R. 161; 86). However, out of annual purchases totaling approximately $900,000 in value, about $100,000 worth comes from outside Ohio directly, and about $200,000 worth from outside Ohio indirectly (R. 161; 50, 65–66). These interstate purchases concededly fall below both the 1950 and the current 1954 minima prescribed by the Board as a prerequisite for the assertion of its jurisdiction over retail stores.[2]

[2] Settled law establishes the Board's authority to husband its limited resources by curtailing its assertion of jurisdiction in cases coming before it. *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418 (C. A. 9), certiorari denied, 342 U. S. 815; *Optical Workers* v. *National Labor Relations Board*, 227 F. 2d 687 (C. A. 5), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U. S. 963; and see *National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 684. Pursuant to this authority, the Board in 1950 determined to withhold its assertion of jurisdiction over enterprises whose interstate operations consisted merely of inflow of goods across state lines unless such enterprises received directly from out-of-state material valued at $500,000 a year, or indirectly $1,000,000 a year. *Federal Dairy Co., Inc.*, 91 N. L. R. B. 638, 639; *Dorn's House of Miracles*, 91 N. L. R. B. 632, 633. In 1954, the Board revised these requirements with respect to intrastate retail stores so as to make the jurisdictional minima $1,000,000 and $2,000,000 respectively. *Hogue & Knott Supermarkets*, 110 N. L. R. B. 543, 544. The validity of these standards is not challenged here.

Petitioners, herein called the Meat Cutters, after an unsuccessful effort to enlist the support of a majority of Fairlawn's approximately 50 employees,[4] asked Fairlawn for exclusive recognition and a union-security agreement requiring that all employees after an appropriate waiting period become union members as a condition of their employment (R. 159; 16–17, 176). When Fairlawn refused to enter into such an agreement, the Meat Cutters picketed Fairlawn's stores in support of its demand and engaged in some secondary pressure on Fairlawn's suppliers (R. 159; 24, 26–28, 115–116).

To counter the union's action, Fairlawn sought both a temporary and a permanent injunction in the Court of Common Pleas for Summit County, Ohio (R. 1–4). The Meatcutters at first sought to remove the case to the federal district court and obtain its dismissal on the ground, *inter alia,* that the subject matter of the action had been preempted by Congress in the National Labor Relations Act, thereby leaving the state court without authority to entertain the action or to grant any of the relief requested (R. 27, 28). When this effort failed because the prerequisites for removal of jurisdiction were found lacking, the Meatcutters pressed virtually the same claim before the Court of Common Pleas, urging that the National

[4] The Union claims here as in the court below that it had achieved majority status among Fairlawn's employees but that its majority had been dissipated by Fairlawn's unfair labor practices. The state court (R. 159; 126) found, however, that the Union never commanded the adherence of more than 18 of Fairlawn's 50 employees.

Labor Relations Board had exclusive jurisdiction to hear and determine the matters complained of (R. 8).[5] The Court of Common Pleas rejected the union's defense. Noting that the volume of Fairlawn's interstate imports concededly fell below the minimum amount set forth in the Board's applicable standard governing its assertion of jurisdiction in cases of this kind (*supra*, n. 3), the court held that "if the Board originally had jurisdiction, it has ceded that to the state court" (R. 150). On the merits, the court found that the picketing, though peaceful, was for an unlawful purpose since it sought to obtain a union-security agreement at a time when the Meatcutters did not represent a majority, that there was no labor dispute, and that there was probative evidence of a secondary boycott by the Meatcutters against Fairlawn's suppliers (R. 153–156). Upon these findings, the Court of Common Pleas enjoined the Meatcutters from engaging in picketing Fairlawn, from trespassing upon Fairlawn's premises,[6] and from exerting secondary pressure on Fairlawn's suppliers (R. 156–157).

On appeal, the Ohio Court of Appeals, hearing the case *de novo* on the same pleadings filed in the trial court, found it unnecessary to discuss the Board's jurisdictional yardsticks. In its view, Fairlawn's busi-

[5] None of the parties sought relief before the Board.

[6] Before the state courts, Fairlawn urged, *inter alia*, that the picketing was enjoinable as a trespass because, at two of the stores, the picketing took place on its property. The place where the picketing occurred in these instances was in front of Fairlawn's stores in an area similar to the areas usually found in front of suburban shopping centers, privately owned but open to the public for purposes of access.

ness "was purely of a local character," its interstate purchases, both direct and indirect, were not substantial, and hence interstate commerce was not burdened or obstructed (R. 160–161). On the merits, the Court of Appeals agreed with the trial court and entered an injunction identical to that entered below (R. 167–168).

A further appeal by the Meatcutters to the Supreme Court of Ohio was dismissed "for the reason that no debatable constitutional issue is involved" (R. 172).

Case No. 50

J. S. Garmon, J. M. Garmon, and W. A. Garmon, herein collectively called Garmon, constitute a partnership doing business as the Valley Lumber Company and operate two lumber yards in the County of San Diego, California, where they sell lumber and building materials at retail (R. 44; 82). In the course of the partnership operation, Garmon annually purchases for resale approximately $250,000 worth of material which originates outside of California (R. 44; 83).

Garmon's employees are not members of petitioners, herein collectively designated as the Union, and the Union has not been certified, designated, or recognized as bargaining representative of the employees (R. 44; 83, 121, 122–123). Nevertheless, on or about November 15, 1952, the Union demanded that Garmon enter into a labor agreement requiring, *inter alia,* that its employees after an appropriate waiting period become and remain members in good standing of the Union as a condition of their employment (R. 44;

2, 9, 83–86). Garmon refused to sign such an agreement unless and until a majority of the employees designated the Union as their bargaining representative (R. 14; 83–87). Thereupon, the Union engaged in peaceful picketing to enforce its demand for execution of the agreement (R. 45; 87). In addition to picketing, Union agents followed Garmon's trucks and threatened persons doing business with Garmon with economic injury (R. 45; 88–89, 124, 180).

About a week after the picketing began, Garmon, on May 7, 1953, filed suit in the Superior Court for San Diego, California, to enjoin the Union from picketing and for damages, alleging that it was in interstate commerce and that the contract sought by the Union would violate the National Labor Relations Act (R. 1–5). The Union contested the court's jurisdiction, claiming that the National Labor Relations Board had exclusive jurisdiction and that Garmon had not exhausted its administrative remedies under the federal Act (R. 5–12). On the same day the state action was instituted, Garmon filed a representation petition with the Board's regional office asking that the question of representation of its employees be resolved (R. 45; 191, 196). The Board's Regional Director, pursuant to the Board's announced policy of declining jurisdiction in cases having an insubstantial impact on the national economy, dis-

[7] Section 8 (a) (3) of the federal Act prescribes as a precondition for a valid union-security agreement that the labor organization entering into the agreement be the statutory bargaining representative of the employees in the appropriate unit covered by the agreement when made.

missed the petition.* No appeal was taken from the Regional Director's dismissal and no unfair labor practice charges were filed by any of the parties.

On July 30, 1953, the Superior Court after hearing issued its findings of fact and conclusions of law (R. 12–17). Briefly, the court found that Garmon's business affected interstate commerce but that the National Labor Relations Board had declined, pursuant to its jurisdictional policy, to entertain a proceeding to determine the proper bargaining representative, if any, of Garmon's employees. The court found further that the Union had engaged in picketing and other conduct for the purpose of compelling Garmon to enter into a union-security agreement requiring Union membership as a condition of employment notwithstanding that the Union had not been certified, designated, or recognized as bargaining representative of Garmon's employees. The court concluded that such conduct on the part of the Union was for an improper purpose in that it would compel Garmon to commit a violation of the National Labor Rela-

* Petitioners do not challenge the Board's settled authority to limit its assertion of jurisdiction in representation or unfair labor practice cases brought before it. See n. 3, *supra*. Pursuant to this authority, the Board has determined to withhold its assertion of jurisdiction over non-retail enterprises whose interstate operations consist merely of inflow of goods across state lines unless such enterprises receive directly from out-of-state goods or materials valued at $500,000 or more, or indirectly $1,000,000 or more. For retail establishments, other than multi-state retail chains, the jurisdictional minima are $1,000,000 and $2,000,000 respectively. *Nineteenth Annual Report of the National Labor Relations Board* (Gov't Pr. Off., 1955), pp. 2, 4. Petitioners' interstate purchases concededly fall below these jurisdictional standards.

tions Act. Accordingly, the court enjoined the Union from picketing or from engaging in secondary pressure to compel the exclusion of a union-security agreement unless and until the Union was properly designated as bargaining representative of Garmon's employees. The court also assessed damages against the Union in the sum of $1,000.00.

On appeal by the Union, the District Court of Appeals for the Fourth District of California reversed (R. 30–42). It held that the National Labor Relations Board had exclusive jurisdiction, that Garmon had not exhausted its administrative remedy (no unfair labor practice charge was filed with the Board), and that the Union's conduct was not unlawful under California law.

Garmon then appealed to the California Supreme Court. That court held, four to three, that where the Board declines to assert jurisdiction because of its jurisdictional yardsticks,* such action amounts to a declaration that the national labor policy will not be jeopardized if the State assumes jurisdiction (R. 48). Reasoning that the cession proviso of Section 10 (a) of the federal Act applies only to cases over which the Board normally asserts jurisdiction, that no conflict arises where the Board refuses to act, and that federal preemption in such cases would enable a party to a labor dispute to flout the national policy, the majority concluded that "the legislative purpose

*The Supreme Court of California correctly observed (R. 49) that the Board does not differentiate between representation cases and unfair labor practice cases in the application of its jurisdictional yardsticks. *C. A. Braukman, et al.*, 94 N. L. R. B. 1609, 1611.

must have been to give the state courts jurisdiction when the board specifically determines that the controversy will not affect the national economy" (R. 48–50). Accordingly, the majority concluded that the state could properly assert jurisdiction.

On the merits, the majority applied California law that "the object of concerted labor activities must be proper and that it must be sought by lawful means, otherwise the persons injured may obtain damages or injunctive relief" (R. 50–51). Since, according to the court, the Union's activities here were for a purpose unlawful under the federal statute, they were not privileged under California law and the Superior Court's judgment was affirmed both with respect to the injunction and with respect to the award of damages (R. 50–53).

Case No. 280

Appellant, P. S. Guss, doing business as Photo Sound Products Manufacturing Company in Salt Lake City, Utah, manufactures specialized photographic equipment for the United States Air Force on a contract basis (R. 24; 11, 12). In order to carry out his contractual commitments, Guss purchased materials from outside the state in an amount "a little under $50,000" (R. 24; 13). The finished products were shipped to Air Force bases in Utah and to Air Force bases outside of Utah (R. 24; 11–12).

Shortly after Guss began his manufacturing operation, United Steelworkers of America, CIO, herein called Steelworkers, began an organizational campaign. In December, 1953, Steelworkers filed with the National Labor Relations Board a petition for certification as

bargaining representative of the employees (R. 25; 1, 10). Pursuant to that petition, Guss and Steelworkers entered into an agreement for a consent election to be conducted by the National Board, the agreement reciting, *inter alia*, that the employer, Guss, was "engaged in commerce within the meaning of Section 2 (6), (7) of the National Labor Relations Act" (*ibid.*). Steelworkers prevailed in the election and on May 4, 1954, was duly certified as bargaining representative of appellant's employees (R. 25; 1).

Shortly thereafter, Steelworkers filed with the National Board unfair labor practice charges alleging that Guss had violated Section 8 (a) (1), (3), and (5) of the National Labor Relations Act (R. 25, 2–3). While these charges were being investigated, the Board promulgated revised standards to govern its assertion of jurisdiction in cases coming before it.[10] Upon application of these standards, the General Counsel concluded that further proceedings with respect to the Steelworkers' charges were not warranted "inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction" (R. 25; 4). Accordingly, on July 21, 1954, the General Counsel declined to issue a complaint and dismissed the charges (*ibid.*).

Nine days later, Steelworkers filed virtually identical charges with the Utah Labor Relations Board (R. 25; 5–6). Throughout the subsequent proceedings based on those charges, Guss urged that the Utah Board was without authority to entertain the matter

[10] See notes 3, 8, *supra*.

derived from such relevant manifestations of Congressional purpose as are available. Settled canons of statutory construction and due regard for our federal system, however, suggest that any doubt on this score be resolved in favor of permitting the States to act, so long as such action is not in conflict with the federal law.

B. The National Labor Relations Act, as to matters covered by it, vests in the Board a potential jurisdiction as broad as the reach of the Commerce Clause. But the Board was not required even under the Wagner Act to assert the full measure of its statutory jurisdiction. Section 10 (a) of that Act merely "empowered," it did not "direct," the Board to prevent unfair labor practices. As a matter of fact, budgetary limitations then, as now, precluded the Board from exhausting its statutory jurisdiction. As the States developed their own labor relations machinery to deal with representation and unfair labor practice matters, problems inevitably arose as to the existence of state power in those areas where the Board, though having jurisdiction, declined to exercise it.

Such a problem arose in the *Bethlehem Steel* case, 330 U. S. 767, where this Court struck down a state certification of a bargaining unit of foremen notwithstanding that the federal Board was declining jurisdiction over petitions for such certifications and notwithstanding that the federal Board had entered into an agreement, albeit without statutory authorization, ceding a portion of its jurisdiction to the state. Six Justices held that the federal Board had not ceded jurisdiction over the subject matter of the

particular case, *i. e.*, certification of foremen's bargaining units, and that the federal Board's declination of jurisdiction in these cases was tantamount to a declaration of federal policy that foremen's bargaining units were inappropriate. Accordingly, they reserved decision as to the existence of state power where the Board declines jurisdiction not for reasons of policy but "for budgetary or other reasons." Three Justices, while agreeing with the final result, questioned the implication which they found in the principal opinion that, while a state might assert jurisdiction where the federal Board "for budgetary or other reasons" declined to act, the Board might not be able to give such power to the States by agreement. In their view, such a principle would "leave uncontrolled large areas of industrial conflict", and hence a construction of the Act invalidating such an agreement procedure was not warranted.

Congress, in drafting the 1947 amendments to the Act, was specifically aware of the *Bethlehem Steel* decision, and the amendments so far as here relevant reflect that awareness. Thus, Congress left unchanged both the broad statutory jurisdiction which it had accorded to the Board in the original Act, and left unchanged also the broad discretion of the Board to decline "for budgetary or other reasons" to assert its jurisdiction. It did, however, deal with the question which was in apparent dispute in *Bethlehem Steel,* namely, the power of cession by agreement. Congress fashioned a proviso to Section 10 (a) which empowered the Board to cede jurisdiction by agreement to state authority where state law was not in-

derived from such relevant manifestations of Congressional purpose as are available. Settled canons of statutory construction and due regard for our federal system, however, suggest that any doubt on this score be resolved in favor of permitting the States to act, so long as such action is not in conflict with the federal law.

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consistent with the corresponding provision of federal law.

The advocates of complete federal preemption rely on this proviso to establish that the Taft-Hartley Act wholly displaces state power in the area covered by the Act. In brief, they argue that federal labor policy is paramount in the field of labor relations affecting interstate commerce, that the cession proviso was designed to insure uniformity of treatment even where States were permitted to act, that Congress has dictated a method by which States could obtain jurisdiction in this area, and that, therefore, all other methods were inferentially excluded. The fact that this construction gives rise to a "no-man's land," where neither federal nor state authority is operative, is in their view an unfortunate consequence which flows from the text and structure of the Act.

The argument, we believe, has many serious flaws. It confuses two separate functions of the Act. The first function of the Act is to prescribe the legitimate rights of both employers and employees in their rights affecting commerce. These rights are binding upon all tribunals, state as well as federal, dealing with controversies involving such rights. The second function is to establish an administrative agency, the National Labor Relations Board, to supervise and enforce certain labor relations matters, *i. e.*, representation questions and unfair labor practice matters, set forth in the Act. The distinction between the broad substantive rights prescribed in the Act and the limited function of the Board in administering certain of these rights is underscored by this Court's decision in

United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62. It does not follow, merely because the Act requires that the rights set forth in the Act be respected by both federal and state tribunals throughout the entire field reached by the federal commerce power, that Congress in creating the Board to administer certain of those rights intended to exclude the States from that area altogether except as prescribed in the cession proviso. Congress entrusted the administration of the Act to the Board and left to the Board also the determination as to the extent to which federal power should be applied in this field. Therefore, a residual state power remains operative in the area to which the Board, as the agency of Congress, has seen fit not to extend the federal power.

Petitioners claim that this interpretation in effect writes the Section 10 (a) proviso out of the Act, since the Board can, merely by declining jurisdiction, permit the States to act in cases where it would be unable to cede jurisdiction under the conditions prescribed in the proviso. The proviso, however, was not intended to deal with the situation where the Board declines, as here, to assert jurisdiction for budgetary or other administrative reasons. As we read the legislative history, the proviso was intended to [illegible] the Board authority, which *Bethlehem* [illegible] put in doubt, to enlist the aid of state agencies [illegible] as a matter of deliberate judgment it concludes that due regard for local interests make such a course desirable and appropriate. The Board's jurisdictional "yardsticks" are not influenced by this consideration at all

but are prompted by the need for utilizing its limited resources in a manner best calculated to effectuate the policies of the Act in cases having the most direct impact on the national economy. Examination of those "yardsticks" reveals that within those limitations there is adequate scope for the operation of the Section 10 (a) proviso. The Section 10 (a) proviso, therefore, can be given its natural reading, namely, to supply the statutory authority, theretofore lacking, for the Board to cede jurisdiction to the states by agreement over cases it would otherwise handle.

C. Whether the existence of state power in this field is tested by the criterion of federal occupation of the field or by the criterion of conflict, the result is the same. Where the Board, pursuant to the discretion vested in it by the Act, determines that the effectuation of federal policy does not require the application of federal power, assertion of state power neither gives rise nor can give rise to conflict which normally results in the exclusion of state regulation. The friction, confusion, and uncertainty arising from the application of dual controls are nonexistent because the federal Board does not exercise nor assert control. To forbid state control also in such a context would mean that Congress intended to create a "no-man's land" wholly unregulated. Such a purpose cannot reasonably be attributed to Congress.

ARGUMENT

The common question presented in these three cases is whether Congress, by vesting in the National Labor Relations Board jurisdiction over certain labor rela-

tions matters affecting interstate commerce, displaced state power even in cases where, as here, the Board properly declines or obviously would decline to assert jurisdiction. This Court reserved that question in express terms in *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933. See also *Garner* v. *Teamsters Union*, 346 U. S. 485, 488, and *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 776. Petitioners in Nos. 41 and 50 and appellant in No. 280 argue that Congress in the National Labor Relations Act, asserting its paramount power under the Commerce Clause, intended that state power be superseded even where the Board properly declines to assert the full measure of its statutory jurisdiction, thereby giving rise to a jurisdictional "no-man's land." Respondents in Nos. 41 and 50 and appellee in No. 280 challenge this conclusion. In their view, the scheme of the Act and the nature of our federal system compel the conclusion that, where the Board declines to assert jurisdiction, the reserved powers of the States are operative. The respective parties find support in state and federal court decisions which by their contrariety evince the strength of the competing considerations and the lack of explicit and authoritative guidance from Congress.[12]

The Board fully appreciates the merits and shortcomings of the respective positions. However, on bal-

[12] For examples of cases upholding state power where the Board declines jurisdiction, see, in addition to the instant cases, *Aladdin Industries* v. *Associated Transport*, 38 L. R. R. M. 2566 (Tenn. Ct. of App., 1955); *Building Trades Council* v. *Bonito*, 280 P. 2d 295 (Nev. S. Ct. 1955); *Hammer* v. *Textile Workers*, 111 A. 308, 34 N. J. Super. 34 (1954); *Drivers Union* v. *Jax Beer Co.*, 36 L. R. R. M. 2188 (Texas Ct. of Civ. App., 1955); *School District* v. *Trades Council*, 37 L. R. R. M.

ance, the Board believes that Congress did not intend to leave the States wholly without power to act in cases where the Board declines to assert jurisdiction, but rather that the States may act, so long as their action is compatible with federal law.[13] More particularly, the Board believes that so far as the instant cases are concerned, the States of Ohio, California, and Utah properly asserted jurisdiction.

A. THE TOUCHSTONES OF FEDERAL-STATE JURISDICTION

At the outset, we think it appropriate to review briefly the basic touchstones of federal and state jurisdiction in this field. Congress derives its power to regulate labor relations matters affecting interstate commerce from the Commerce Clause of the Constitution. If Congress does not exercise that power, States retain their inherent right to exercise whatever power is appropriate to their territorial jurisdiction even though interstate commerce may be affected. *Kelly* v. *Washington,* 302 U. S. 1, 9–10; *The Minnesota Rate Cases,* 230 U. S. 352, 402. On the

2232 (Mich. Cir. Ct., 1955); *Raisch Motors*, 35 L. R. R. M. 1631 (N. Y. S. L. R. B., 1955).

For examples of cases holding to the contrary, see *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659 (C. A. 10, 1955); *N. Y. Board* v. *Wags Transportation System*, 130 N. Y. S. 2d 731 ~~741~~, affirmed on other grounds, 284 App. Div. 883, 134 N. Y. S. 2d 603 (1954); *Universal Car Co.* v. *I. A. M.*, 35 L. R. R. M. 2087 (Mich. Cir. Ct., 1954).

[13] In referring to the position of the Board on the difficult questions presented by these cases, we do not mean to imply that the Board is unanimous. The position taken in this brief is supported by a majority of the Board. Minority views within the Board are, on the one hand, that state power is wholly superseded within the area occupied by the Federal Act; and, on the other hand, that in the area where the Board declines jurisdiction, the states are wholly free to act without being subject to any limitations drawn from the Act.

other hand, if Congress elects pursuant to its commerce power to occupy the field, "its control by the Supremacy Clause supersedes or, in the current phrase, pre-empts state power." *Auto Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266, 271.

Congress, however, need not occupy the whole field. Its power under the Commerce Clause is permissive, not compulsory. It may circumscribe its regulation and occupy only a limited field. "When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced." *Kelly* v. *Washington,* 302 U. S. at 10.

It is well settled that the National Labor Relations Act falls in this middle ground. Congress did not by that Act "exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 480. It left much to the States, "though Congress has refrained from telling us how much." *Garner* v. *Teamsters Union,* 346 U. S. 485, 488.

Prior litigation in this Court has clarified to an appreciable extent the respective areas of federal and state jurisdiction in this field. The net of this litigation is summarized in the *Anheuser-Busch* opinion and will not here be recapitulated in detail.[14] We are con-

[14] We do not overlook the several decisions in this field which this Court has issued since *Anheuser-Busch.* See especially *Teamsters Union* v. *New York, N. H. & H. R. Co.,* 350 U. S. 155; *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U. S. 62; *Auto Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266. While these decisions clarify further the respective areas allocated to state and federal authority in the field of labor relations affecting interstate commerce, they

cerned here only with the category of cases with which the Board is specifically empowered to deal by Section 9 (the representation provisions) and Sections 8 and 10 (the unfair labor practice provisions) of the Act. In such cases, it is settled law that, subject to exceptions not relevant here,[18] if the Board elects to assert jurisdiction, state power is displaced.

It does not necessarily follow, however, that state power would likewise be displaced in this area in cases where the Board, for budgetary or other administrative reasons, declines, or obviously would decline, to assert jurisdiction. Here, too, the extent of federal occupation is the touchstone by which residual state power must be gauged and the extent of that occupation was for Congress to determine.

Needless to say, any doubt in this regard must, on settled canons of statutory construction, be resolved in favor of permitting the States to act, so long as such action is not in conflict with federal law and respects rights guaranteed by the Act. As this Court said in *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510, quoted with approval in *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85: "In

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do not, so far as material here, alter the basic scheme outlined in the *Anheuser-Busch* opinion. The *Arkansas-Oak Flooring* case is discussed, *infra*, pp. 32–34, 44–45.

[18] Such exceptions arise, for example, with respect to the mass picketing type of situation presented in *Auto Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266, and with respect to state court damage suits in the kind of situation presented in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656. In such situations, state action is not wholly precluded even though the federal Board asserts or would assert jurisdiction pursuant to the provisions of the Act.

construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even when that may be done, unless, and except so far as, its purpose to do so is clearly manifested." See also *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 749.

B. THE EXTENT OF FEDERAL OCCUPATION

It seems fair to say that, so far as the question here at issue is concerned, Congress has not either in the original or in the amended Act "clearly manifested" its purpose. But even applying less stringent criteria, we believe logic and authority militate against the view that state authority is wholly displaced. We turn to the relevant statutory provisions.

1. THE WAGNER ACT

Congress in the National Labor Relations Act of 1935, with respect to matters covered by the Act, vested in the Board a potential jurisdiction as broad as the reach of the Commerce Clause. Sections 2 (6), 2 (7), 9, and 10 of the Act. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607. On the other hand, the Board was not required to assert the full measure of its statutory jurisdiction. Section 10 (a) of the Wagner Act merely "empowered," it did not "direct," the Board to prevent unfair labor practices, and Section 10 (b) of that Act granted the "power" instead of imposing the "duty" to issue a complaint upon the filing of charges.

As a matter of fact, the Board did not, even under the Wagner Act with its more limited unfair labor practice coverage, assert jurisdiction over all cases falling within its statutory ambit. Budgetary limitations and other administrative considerations then, as now, precluded exhaustion of its statutory jurisdiction. It was foreseeable, therefore, that as the States developed their own labor relations machinery to deal with representation and unfair labor practice matters problems would arise concerning the existence of state power in those areas where the Board, though having jurisdiction, declined to exercise it.

2. THE BETHLEHEM STEEL CASE

Such a problem arose in this Court for the first time in *Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U. S. 767, decided in April, 1947, during the very period when Congress was debating the proposed Taft-Hartley amendments. In that case, a group of foremen employed in an enterprise affecting interstate commerce had applied for certification to the New York State Labor Relations Board. At the time of this application, the federal Board was following the practice, subsequently changed, of denying for reasons of policy, but without renouncing jurisdiction, petitions for certification of foremen's units. This Court held that the federal Act nonetheless precluded the State from regulating the organizational rights of foremen. In so holding, the Court treated the federal Board's practice of denying foremen's petitions as tantamount to a policy determination by the federal agency that foremen's

bargaining units were inappropriate. In the Court's view, therefore, this was not a case "where federal power has been delegated but lies dormant and unexercised" but one where federal power had been exercised and state power was superseded (330 U. S. at 774–775).[16]

At this point, nothing more was involved than routine application of familiar principles of federal-state jurisdiction in the area of interstate commerce. New York argued, however, that the *Bethlehem* case was different because the Board could by agreement cede to the States, and with respect to New York had ceded, jurisdiction over local industries.[17] The Court, while characterizing this procedure as a "commendable effort to avoid conflict in this overlapping state of the statutes," pointed out that nothing in the agreement with New York affected disposition of the case before it since the federal Board had "made no concession or delegation of power to deal with this subject." 330 U. S. at 776. The Court added, however, that "The election of the National Board to

[16] The Court made it clear that the same result would follow even if, as later occurred, the federal Board supported the right of foremen to be certified so that the federal and state boards would be following the same policy. "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition * * *." 330 U. S. at 775–776, quoting from *Charleston R. Co.* v. *Varnville Co.*, 237 U. S. 597, 604.

[17] The Wagner Act did not contain a provision specifically providing for such cession agreements. Congress, as we show later, remedied this omission in the Taft-Hartley Act. For a discussion of the Board's practice under the Wagner Act with respect to cession agreements and the reason for such agreements, see the separate opinion in *Bethlehem Steel*, *supra*, 330 U. S. at 782–784.

decline jurisdiction in certain types of cases, *for budgetary or other reasons* presents a different problem which we do not now decide." [Emphasis added.]

This reservation prompted three Justices to join in a separate opinion. They agreed that where, as in *Bethlehem,* the Board had taken the subject matter in hand and made a policy determination with respect thereto, state power respecting that subject matter was superseded. They disagreed, however, with the implication which they read in the principal opinion that while a state *might* be able to assert jurisdiction over certain types of cases where the Board "for budgetary or other reasons" declined to act, the Board could not by agreement with the states "divide, with due regard to local interests, the domain over which Congress has given the National Board abstract discretion but which, practically, cannot be covered by it alone." In their view, "The inability of the National Board to exercise its dormant powers because of lack of funds ought not to furnish a more persuasive reason for finding that concurrent State power may function than a deliberate exercise of judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards." (330 U. S. at 778, 779). And, the three Justices added, to hold that the federal Board could not invoke the aid of state agencies as an effective means of accomplishing a common end would be "to leave uncontrolled large areas of industrial conflict. Neither what Congress has said in the National

Labor Relations [Wagner] Act, nor the structure of the Act, nor its policy, nor its actual operation, should be found to prohibit the Board from exercising its discretion so as to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests." 330 U. S. at 784.

3. THE TAFT-HARTLEY AMENDMENTS

This was the posture of the law when the proposed Taft-Hartley amendments were being considered. *Bethlehem* left undecided the question of state power in cases where the federal Board declined jurisdiction "for budgetary or other reasons." Six of the Justices, however, seemed at least open to a suggestion that in such cases federal power lies "dormant and unexercised," and the States might act, and three of the Justices implied that this result should follow. To the extent that there was disagreement, if any, it was on the question whether the federal Board could, by agreement, cede jurisdiction to the States where "due regard to local interests" made it desirable and appropriate for the Board to enlist state aid.

Congress was aware of these problems when it amended the National Labor Relations Act and was likewise specifically aware of this Court's decision in *Bethlehem*. *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397–398 and footnotes thereto. Critical, therefore, is what Congress did in the amended Act to resolve these problems.

Congress left unchanged the broad statutory jurisdiction which it had accorded to the Board in the Wagner Act. And Congress left unchanged also the discretionary language of Section 10 (a) and 10 (b) under which the Board was "empowered," not "directed," to proceed in cases brought before it, and pursuant to which the Board has for budgetary or other administrative reasons continued to decline jurisdiction in certain categories of cases in order that it might better effectuate the policies of the Act in cases which it deems of greater importance to the national economy. See *Breeding Transfer Co.*, 110 N. L. R. B. 493.[18] The problem as to state power in this field, therefore, remained as it was before. Congress did not answer, at least in express terms, the question reserved in *Bethlehem* as to the power of States in cases where the Board declines "for budgetary or other reasons" to assert jurisdiction. It did, however, deal with the second question raised in the *Bethlehem* case, namely, the problem of cession by agreement. Thus, Congress specifically added to the language of Section 10 (a) which "empowered" the Board to deal with unfair labor practices the following proviso:

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[18] As already stated, *supra*, p. 3, n. 3, p. 8, n. 8, p. 11, the Board's power to decline jurisdiction pursuant to appropriate standards is not challenged here. Judicial authority confirms the propriety of the Board's practice in that regard. For manifestations of Congressional knowledge and approval of the Board's practice, see *Report of the Joint Committee on Labor-Management Relations*, S. Rep. 986, Part 3, 80th Cong., 2d Sess., 11–13; S. Rep. 99, 81st Cong., 1st Sess., 40; H. Rep. 1852, 81st Cong., 2d Sess., 10; *Hearings Before Senate Committee on Labor and Public Welfare on S. 249*, Part 1, 81st Cong., 1st Sess., 175–176, 177. *Hearings Before Senate Committee on Expenditures In The Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., 40.

> *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It is this proviso upon which the advocates of federal preemption principally rely to establish that, absent cession by the Board as therein provided, the Taft-Hartley Act completely supersedes state power in the field of unfair labor practices affecting interstate commerce and, by analogy, in the field of representation matters affecting commerce. In their view, the language of this proviso does more than meet the simple problem put in the *Bethlehem* case as to the scope and effect of cession agreements. Arguing from the principle *inclusio unius est exclusio alterius,* they maintain that Congress in the Section 10 (a) proviso dictated a method by which the States could obtain jurisdiction over representation and unfair labor practice matters affecting commerce, and having dictated this method, all other methods are inferentially precluded. The preemption advocates argue further that Congress thereby intended to insure that "the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso ap-

plies." *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397–398, n. 23. Finally, they argue that, when Congress chose to permit state regulation to be operative in the otherwise federally preempted field, it made specific provisions in the statute,[19] thus indicating that except as so provided, the States were not to intrude upon the federally preempted area. In sum, they contend that "Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." *Amalgamated Association, supra*, 340 U. S. at 397–398. Since Congress did not "spell out with particularity" that the States were to obtain jurisdiction merely by virtue of the Board's declination of jurisdiction, the States could not do so. The fact that this construction gives rise to a "no-man's land" where neither federal nor state authority is operative is, in their view, at worst an unfortunate as well as unforeseen consequence which flows from the text and structure of the Act.

[19] See, in addition to the Section 10 (a) proviso, Section 8 (d) which provides, *inter alia*, for notice to state mediation and conciliation services in the event of certain strikes; Section 202 (c) and 203 (b) which define the role of state and local mediation services; Section 14 (a) which precludes States from defining as employees for collective bargaining purposes any individuals who under the federal Act would be supervisors; Section 14 (b) which preserves to the States the right to further condition or to outlaw union security agreements permissible under the federal Act; and Section 2 (2) and (3) which excludes States or political subdivisions thereof, and employees of such entities, from the operation of the federal Act.

The argument, we believe, has serious flaws. The advocates of federal preemption overlook the fact that the Act serves two distinct, though related, functions. The first function is "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce" (Section 1 (b) of the Labor Management Relations Act of 1947). When Congress enacted the original National Labor Relations Act in 1935, it was concerned primarily with employee rights. Accordingly, in Section 7 of that Act, it set forth in broad terms the right of employees to engage in organizational activity, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection. Section 8 of that Act implemented those rights. In 1947, however, Congress, as indicated above, concluded that protection of employee rights was not enough and that "certain practices by some labor organizations" (Section 1 of the amended Act) had arisen which, in the interest of safeguarding the free flow of commerce, called for a statutory declaration of the rights of employers also. Accordingly, Congress proscribed, particularly in Section 8 (b) of the 1947 Act, practices which it deemed to be intrusions upon those rights. Though couched in terms of prohibition, the statutory scheme makes it manifest that Congress intended to add to the federal protection given employee rights by the 1935 Act a parallel federal protection against intrusion on the rights of employers.

The *Amalgamated Association* case (*supra*) upon which the advocates of federal preemption rely is

concerned with this function of the Act, namely, the scope of the federal protection accorded the rights granted in the federal act. *Amalgamated Association* is but one of a line of decisions beginning with *Hill* v. *Florida*, 325 U. S. 538, and including more recently *United Auto Workers* v. *O'Brien*, 339 U. S. 454, and *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, in which this Court has held that, insofar as Congress has in the several provisions of the Act declared substantive rights of general application relating to employees and employers in all cases affecting interstate commerce, these rights are binding upon all tribunals, state as well as federal, dealing with controversies involving such rights. Congress has immunized these rights against invasion from any source.

The Act, however, in addition to declaring federally protected employee and employer rights, serves a second function. It establishes an administrative agency, the National Labor Relations Board, to supervise and enforce certain labor relations matters, *i. e.*, representation questions and unfair labor practice matters, set forth in the Act, and the question here is whether Congress intended the Board to have control of these matters to the exclusion of the States even where the Board for budgetary or other administrative reasons declines to assert that control. The *Amalgamated Association* case and the companion cases here cited did not present that issue, and the Court did not pass upon it. Indeed, wholly different considerations apply.

The distinction between the broad guarantees of the substantive rights prescribed in the Act and the lim-

ited function of the Board in administering certain of those rights is underscored by this Court's decision last term in the *Arkansas Oak Flooring* case. In that case, the question was whether the State of Louisiana could enjoin a majority union from engaging in peaceful picketing for recognition by an employer admittedly engaged in interstate commerce and subject to the Act. The picketing union, United Mine Workers, had filed none of the data or affidavits prescribed in Section 9 (f), (g), and (h) of the Act as a prerequisite for invoking the Board's processes. The Louisiana court held that since the union's non-compliance precluded it from obtaining recognition through the National Board, such recognition by the employer would be illegal, and picketing for that purpose could be enjoined. This Court reversed on the ground that the Section 9 (f), (g), and (h) provisions constituted merely a limitation on the Board's powers and not on the rights guaranteed by the Act. The Court said (at pp. 73–74):

> The noncompliance of the union with § 9 (f), (g) and (h) in the instant case precludes any right of the union to seek certification of its status by the Labor Board. *Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.*
>
> The industrial relations between the company and its employees nonetheless affect interstate

commerce and come within the field occupied by the National Labor Relations Act, as amended. *The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them.* [Emphasis added.]

In sum, then, we submit that the federal rights guaranteed by the Act and the jurisdiction of the Board in that regard cannot be equated. So far as employee and employer rights are concerned, the Act requires that those rights be respected by both state [20] and federal tribunals throughout the entire field reached by the federal commerce power except as the Act specifically reserved certain areas for state control (*supra,* n. 19). However, it does not follow that Congress, in creating the National Labor Relations Board to administer certain substantive rights guaranteed by the Act, intended to exclude States from that area altogether except by means of the cession proviso. Nor does it follow that Congress, in establishing certain procedures which the Board is to follow in the implementation of rights entrusted to its administration, intended to preclude state implementation of those rights where for one reason

[20] "The Court has ruled that a State may not prohibit the exercise of rights which the federal Acts protect." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474, quoted with approval in *Arkansas Oak Flooring, supra,* at p. 75, where the Board, as in these cases, although for a different reason, did not exercise jurisdiction.

or another Board procedures are inapplicable. While Congress did authorize the Board to administer the representation and unfair labor practice provision of the Act, it left to the Board the determination as to the extent to which its administrative regulation should be applied in this field. Under settled canons of federal-state jurisdiction applicable here (*supra*, pp. 20–23), state power would remain operative in the area to which the Board, as the agency of Congress, has seen fit not to extend the federal administrative process, so long as the exercise of such state power is in accord with, and not in derogation of, the federal law and rights secured thereby. As this Court said in *Bethlehem Steel*, 330 U. S. at 774:

> when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, * * *, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, * * *. The states are in those cases permitted to use their police power in the interval * * *. [Citations omitted.]

We believe this language is fully applicable here. Congress knew when it enacted the Taft-Hartley Act that the Board under the predecessor statute had carved out a segment of cases which it thought had

so limited an impact on the national economy as not to warrant expenditure of its limited resources. Under such circumstances, "where federal power has been delegated but lies dormant and unexercised" (330 U. S. at 775), the reserved powers of the States come into play.[21] If Congress disapproved of this result, which in our opinion *Bethlehem* foreshadowed, it could readily have fashioned language to make clear that throughout this delegated area, it "intended no regulation except its own." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 236.

Congress did not do so. Nor, we submit, can the Section 10 (a) proviso be construed to reach this result. The significance which the advocates of fed-

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[21] This was the view of the Board under the Wagner Act. In its brief amicus to this Court in the *Bethlehem Steel* case, the Board said (at p. 69):

> In this field in which the National Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10 (a) * * *. The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are nonexistent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction.

Under the amended Act the Board, as a matter of practice, has refrained from intervening in any way in situations where the States, despite the absence of a cession agreement, have taken action with respect to cases over which the Board declines to assert jurisdiction. See the Board's Memorandum, pp. 10–11, filed with this Court in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656.

eral preemption attribute to Section 10 (a) mistakes, in our judgment, the Congressional purpose which prompted its adoption. As we read its origin and legislative history, the cession proviso does not deal with the problem of state authority where the Board declines to assert its jurisdiction for budgetary or other administrative considerations. As noted above, the proviso was adopted as a consequence of this Court's decision in *Bethlehem Steel, supra.* The concurring opinion in that case read the majority opinion as implying that the States could act where the Board's powers lay "dormant and unexercised" for budgetary or other reasons but that the Board was precluded from ceding to the States jurisdiction over enterprises where "due regard to local interests" made it desirable "to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests" (330 U. S. at 779, 784). In the view of the concurring Justices, if (as they read the "overtones" of the majority opinion) the States could act where the Board declined to assert jurisdiction because Congress had put it on "short rations," there was no compelling reason—indeed, the relevant considerations pointed the other way—why the Board could not by agreement cede jurisdiction to the States pursuant to "a *deliberate exercise of judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards.*" [Emphasis added.] *Bethlehem*

Steel, supra, at 778. The cession of jurisdiction by the Board in these circumstances, the concurring opinion added, should be viewed not as an "encroachment upon national authority" but rather as an "effective means of accomplishing a common end" (330 U. S. at 783). The cession proviso, we believe, was designed to supply that authority to the Board, so that where the Board as a matter of deliberate judgment concludes that due regard for local interests makes it desirable to enlist the aid of state agencies, it can accomplish that purpose by agreement, subject to the qualification that the applicable state law is not inconsistent with federal law.[21]

The Board's administrative jurisdictional criteria, however, are not based upon such considerations. Examination of the Board's jurisdictional "yardsticks" (N. L. R. B., *Nineteenth Annual Report* (G. P. O. (1955), pp. 2–5)) and of the Board decisions in which they were promulgated reveals that they were in no wise prompted by "a desire to establish broader State jurisdiction * * *" (*Breeding Transfer Company,* 110 N. L. R. B. 493, 497).[22] Thus, the Board's

[21] It should be noted here that the Board has been unable, because of the prescribed conditions, to consummate any such agreements. Congress has been aware of this situation and considered the feasibility of deleting these conditions in order to reduce the tremendous volume of cases brought before the Board. S. Rep. 986, Joint Committee Report, 80th Cong., 2d Sess., 31 (1948). Congress, however, has taken no action in this regard. The advocates of federal preemption argue from this post-legislative history that Congress has thereby manifested its intent to preclude State action in the absence of cession by the Board. Precisely what inference may be drawn from such Congressional inaction is, in our judgment, wholly speculative.

[22] Thus, the Board enumerated among the criteria which it did apply "(1) the problem of bringing the caseload of the

jurisdictional standards are for the most part phrased in terms of dollar limits without regard to the nature of the industry involved.

The argument is advanced, however, that if the States may act where the Board declines to assert jurisdiction, the effect, if not the purpose, of the Board's jurisdictional limitations is to leave little or no room for the operation of the cession proviso. The argument, we think, is unpersuasive. If, for example, state law not inconsistent with the provisions of the federal Act existed, the Board could under the terms of the proviso cede jurisdiction completely over all cases affecting commerce arising in fields other than mining, manufacturing, communications and transportation without regard to dollar limits. This would include such important fields as the building and construction trades, retail and service industries, insurance companies, many public utilities, and the like. The only limitation on the Board's power of cession would be that it could not cede cases in "mining, manufacturing, communications, and transportation" unless they were predominantly local in character.

Moreover, the proviso, for example, could be operative under the Board's existing standards not only with respect to cases in industries other than the four

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Board down to manageable size, (2) the desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) overall budgetary policies and limitations." *Breeding Transfer, ibid.*

specifically excepted, but even with respect to cases in those industries themselves. Thus, the Board presently asserts jurisdiction over non-retail industries which ship goods out of state or performs services out of state valued at $50,000 or more. It is apparent that an enterprise which meets this standard might nonetheless be predominantly local in character, so that it might well be desirable to cede to the States jurisdiction over such enterprises. Similarly, the Board will presently assert jurisdiction over a local transportation company if it receives as much as $100,000 from services rendered as a link in interstate operations. Here, too, the proviso, if otherwise applicable, might well empower the Board to cede jurisdiction because the transportation company was predominantly local in character. Insofar as the Board might choose to impose less stringent criteria in the field of mining, manufacturing, communications, and transportation, there would, of course, be even more scope for application of the proviso.

To recapitulate, we believe that Congress in Section 10 (a) of the amended Act reaffirmed that the Board, as the agency to which Congress delegated the handling of representation and unfair labor practice cases, should determine the extent to which federal jurisdiction should be asserted in order "to eliminate the causes of certain substantial obstructions to the free flow of commerce" (Section 1 of the original and amended Act). Within this area, Congress further provided that the Board could, by agreement, cede jurisdiction to a state but subject to the condition that state law was not inconsistent with applicable federal

law. Pending a determination by the Board or by Congress itself that a further extension of federal power in this field is required to effectuate the policies of the federal Act, the residual powers of the States may be exercised to fill the void which would otherwise arise and to regulate industrial relations within the field occupied by the Act but from which the Board has withdrawn, subject to the proviso declared by this Court that the parties "are controlled by its [the federal Act's] applicable provisions and all courts, state as well as federal, are bound by them." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74.

C. THE "CONFLICT" TEST

Thus far, we have been discussing the question here presented in terms of "occupation of the field," namely, whether Congress in the exercise of its paramount commerce power has occupied the field so as to supersede state power. We do not overlook, however, the fact that conflict has likewise been regarded as a criterion by which to test the question of federal preemption. See *Garner* v. *Teamsters Union*, 346 U. S. 485; *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656; *Bethlehem Steel, supra*, 330 U. S. 767. Generally speaking, this Court has held that where Congress has prescribed specific procedures for the resolution of representation issues or the prevention of unfair labor practices, conflicting state procedures to the same end are excluded. On the other hand, by parity of reasoning, where no such conflict exists, state

procedure survives. *Laburnum, supra,* 347 U. S. at 665.[24]

We doubt whether the conflict criterion, at least in this limited frame of reference, is anything other than an alternative phrasing of the occupation of the field theory. But we need not resolve that problem in this case. For, contrary claims notwithstanding, we submit that no basis is shown under the conflict criterion to warrant exclusion of state action here. The critical fact is that we are dealing here with cases where the Board declines to act altogether and the unchallenged premise is that that declination is proper in terms of effectuation of the Act. The Board's inaction in such a situation, unlike its inaction in *Bethlehem,* is not an exercise of the Board's judgment that no action is appropriate. It is, at most, a declaration by the Board, pursuant to the discretion vested in it by Congress, that effectuation of the policies of the Act does not require the application of federal power. Where the federal Board thus declines to act, the mere assertion of state power does not, without more, give rise to such conflict as to require the exclusion of state regulation. *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 313; *United Electrical, Radio and Machine Workers* v. *Worthington Corp.,* 38 L. R. R. M. 2507, 2510 (C. A. 1, decided July 31, 1956). The friction, confusion, and uncertainty arising from

[24] As we have already observed, n. 16, the term "conflict" is not to be interpreted in too literal a sense. Even where state and federal authority would apply parallel or duplicate remedies as, for example, in *Bethlehem* or possibly even in *Garner,* the potentialities of conflict exist where state and federal authority are each "brought to bear on precisely the same conduct." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 479.

the application of dual controls in other contexts are non-existent here because the federal Board does not exercise nor assert control. So long as substantive conflict or impairment of federal rights is not shown, to forbid state control would be "needlessly to forbid preexisting State authority" (*Bethlehem Steel*, 330 U. S. at 780) and deliberately to create a "no-man's land" wholly unregulated. We believe that neither the statute nor judicial interpretation warrants this result.[25]

D. APPLICATION OF THE FOREGOING PRINCIPLES TO THE INSTANT CASES

Under its prevailing jurisdictional standards, the validity of which is not challenged here, the Board would have declined to assert its jurisdiction over the three instant cases. Indeed, in Case No. 280, the Board's General Counsel did decline jurisdiction over

[25] Petitioners in No. 41 and appellant in No. 280 argue also, citing *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659, 663 (C. A. 10), that if States were permitted to act in the area here under consideration without an express ceding of jurisdiction, "an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly pre-empted by Congress." The Board, as shown *supra*, notes 3, 8, has already by decision and public release set forth its jurisdictional standards. In answer to a similar complaint regarding the competence of States to adjudicate federal rights under the Act, this Court said in *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511, 518–519:

> We cannot assume that this confidence [in the state courts] has been misplaced. Neither the course of this case, nor the history of state court actions since the decision in *Garner* v. *Teamsters Union*, 346 U. S. 485, demonstrates recalcitrance on the part of state courts to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems. * * *

the precise controversy brought before the Utah tribunal, and in Case No. 50, the Board declined jurisdiction over a representation case involving the Garmon enterprise. Accordingly, if the principles set forth in the preceding sections of this brief are correct, the States of Utah, California, and Ohio were free to assert jurisdiction in the respective cases.

This does not mean, however, that having elected to assert jurisdiction, the several state tribunals were free to apply their own law without regard to applicable federal law and to rights protected under the federal Act. As already shown, the several enterprises here involved were engaged in activities affecting interstate commerce and, accordingly, the "industrial relations between the compan[ies] and [their] employees * * * come within the field occupied by the National Labor Relations Act, as amended." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74. Although the federal Board has voluntarily eliminated itself from exercising administrative jurisdiction, "[s]uch elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended * * *. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." *Ibid.* In the *Arkansas Oak Flooring* case, the Board did not exercise jurisdiction over the particular union involved because of the latter's failure to file data required by Section 9 of

the Act. That the Board's non-exercise of jurisdiction in the instant cases is due to its own voluntary action, rather than through the failure of a union to comply with Section 9, does not alter or diminish the controlling force of federal law. Here, as in *Arkansas Oak Flooring*, "the state court is governed by the federal law which has been applied to industrial relations, like these, affecting interstate commerce * * *. A 'State may not prohibit the exercise of rights which the federal Acts protect.' *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474, and see *Garner* v. *Teamsters Union*, 346 U. S. 485, 494." *Id.* at 75.[20]

The question that remains, therefore, is whether the actions taken by the state courts in the instant cases conform to the controlling principles declared by this Court. We submit that they did, and that the actions here taken were in accord with the governing federal law and did not impair federal rights secured by the Act. Resolution of the instant cases does not require a complete catalogue of these rights. It is sufficient to indicate that Congress has accorded protection to the rights of both employees and employers in industrial relations affecting commerce. With respect to Case No. 280, the federal Act protects the right of the employees involved to engage in collective bargaining, and to be free of unlawful discrimination in the terms and conditions of their employment. The action taken by the Utah tribunal in no sense prohibited,

[20] As the *Arkansas Oak Flooring* case demonstrates, States would not be bound by those procedural provisions of the Act which Congress patently devised to be applicable to the National Labor Relations Board in the administration of the statutory provisions entrusted to its regulation.

or trenched upon, these rights; on the contrary, it insured against their continued violation. With respect to Case No. 41 and Case No. 50, the question presented was the right of a union to engage in picketing and other conduct for the purpose of obtaining a union-security agreement where the union involved was neither certified nor designated as, and did not represent a majority of the employees involved. No employee right guaranteed by the Act immunizes such conduct. Moreover, the finding of the state tribunals that such conduct was unlawful is consistent with the Board's findings in analogous situations that such conduct is violative of Section 8 (b) (2) of the Act and subject to a cease-and-desist order. See *Denver Bldg. & Constr. Trades Council*, 90 N. L. R. B. 1768; See also *Garner* v. *Teamsters Union*, 346 U. S. 485, 488–489; *Medford Bldg.* v. *Constr. Trades Council*, 96 N. L. R. B. 165.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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DECEMBER, 1956.

APPENDIX

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. 141 *et seq.*) are as follows:

SECTION 1. * * *

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condi-

tion of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has

been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may

involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance

with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

* * * * *

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

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